Supreme Court, U.S.
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No. 09-264

IN THE

Supreme Court of the United States

CENTAURI SHIPPING LTD.,
Petitioner,

v.

WESTERN BULK CARRIERS KS, WESTERN BULK AS, AND WESTERN BULK CARRIERS AS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

Centauri Shipping Ltd. is not a publicly held corporation in the United States and there are no corporate parents, subsidiaries, or affiliates of Centauri Shipping Ltd. which are otherwise publicly held in the United States.

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REPLY BRIEF FOR THE PETITIONER

Respondent WBC's principal attack on the petition is its assertion that Centauri "vastly overstates the importance" of the issues presented, suggesting that the effects of the Second Circuit's decision below will be limited to New York and that a recent decision by the Second Circuit in *Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 2009 U.S. App. LEXIS 22747 (2d Cir. Oct. 16, 2009), somehow renders it pointless for the Court to grant review. (Opp. 4-5).

WBC's arguments, however, do not undermine Centauri's showing that the case is worthy of the Court's review. If anything, they provide further support for the need for guidance from the Court to ensure the preservation of the remedy of maritime attachment.

First, as Centauri has emphasized in its petition, the Second Circuit plays a uniquely prominent role when it makes judicial determinations regarding Rule B attachments, due to its historical role as a major maritime port and its present prominence as a world financial capital. Decisions issued by the Second Circuit addressing Rule B are therefore routinely followed by Federal courts, making the Second Circuit tantamount to a 'Federal Circuit' for maritime attachments. (Pet. 18-19; 25-26).

Thus, contrary to WBC's suggestion, the repercussions of the Second Circuit's decision below will be felt nationally, and will not merely be constrained and cabined to New York.

Second, WBC's assertion that the Second Circuit's recent *Jaldhi* decision vitiates or moots the need for

the Court to grant review is groundless. The *Jaldhi* decision, while deeply troubling (as discussed in Part III below), is not directly applicable to this case, because the *res* under attachment here is a surety bond issued by Travelers Casualty and Surety Company of America and posted by WBC, not electronic funds transfers in the temporary possession of an intermediary bank with which the *Jaldhi* decision was solely concerned. *Jaldhi*, 2009 U.S. App. LEXIS 22747, at *35.[1] The *Jaldhi* decision does, however, elevate the importance of Centauri's petition in that the decision continues the trend of permitting state law to supplant and interfere with the uniformity of federal maritime law in the context of maritime attachments.

I. THE APPLICATION OF STATE LAW OVER FEDERAL MARITIME LAW BY THE LOWER COURT JUSTIFIES REVIEW OF THIS CASE

WBC attempts to justify and rationalize the Second Circuit's decision below to apply New York

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[1] The fact that there may exist a potential alternative basis on which a lower court might have relied in reaching the decision appealed from does not justify denial of review. *See Lawrence v. Chater*, 516 U.S. 163, 170 (1996) ("it is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the [lower] court below might have relied on") (emphasis in original) (internal citations omitted).

state law to the issue of a defendant's "presence" in the context of Rule B, by noting that in the absence of federal maritime law as to the meaning of the presence requirement it was proper for the Second Circuit to look to state law. (Opp. 6). However, this argument is based on a faulty premise and thus, should be rejected.

It is true that Rule B itself does not define "found within the district," since the drafters deemed the definition of the clause "best left for the time being to development on a case-by-case basis." *See* Notes of Advisory Committee to 1966 adoption of Rule B: Note to Subdivision (1).

The drafters of the modern incarnation of Rule B, however, also stated that their intent was to preserve "the traditional maritime remedy of attachment and garnishment, and [carry] forward the relevant substance of Admiralty Rule 2" and that the modern rule "follows closely the language of Admiralty Rule 2" with no intention to change "the condition that makes the remedy available." *Id.*

Further, the Advisory Committee explained that it had considered whether the rule should be changed to permit attachment only when the defendant could not be found within a state rather than merely in a particular district within a state, and "concluded that the remedy should not be so limited." *Id.* The Advisory Committee noted that the effect of this decision was to permit attachment even in cases where jurisdiction over the defendant may be

independently obtained, such as where "a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction" or where "the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, [but] there is in the district no officer on whom process can be served." *Id.*

This consideration as to whether the rule should be altered was "brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district." *Id.* The advent of then Rule 4(f) (now Rule 4(k)) would have created a situation where the presence of a defendant in one district within a state would automatically render that defendant present in every district within the state. *See, e.g., Amber Int'l Navigation, Inc. v. Repinter Int'l Shipping Co., S.A.*, 2009 U.S. Dist. LEXIS 55779 (S.D.N.Y. June 29, 2009).

Thus, it is clear that the drafters of Rule B contemplated that the "presence" of a defendant so as to avoid a maritime attachment must require sufficient activity within a particular district – not merely within a state as a whole. They further rejected the notion that jurisdiction obtained through statewide service of process supplanted any need for maritime attachment or that such "presence" would have curtailed the availability of maritime attachment under the traditional form of the rule.

The Second Circuit, in its application of New York's corporate registration statute and case law, thus violated the intention of the drafters of Rule B. In no way could the drafters of Rule B have intended the result the Second Circuit reached, which defies the historical purposes and operation of the remedy of maritime attachment.

This overriding of federal maritime law in favor of state law is particularly pernicious given Rule B's unique status as being solely authored by this Court since 1844. *See, e.g., Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 732 F.2d 1543, 1549 (11th Cir. 1984) (noting that this "lineage sets [Rule B] apart from common law based sequestration, garnishment, and attachment laws developed by the legislatures of the several states.")

As the sole author of Rule B, and thus, the ultimate proponent of its requirements, this Court should provide guidance as to the meaning and application of the Rule so as to ensure its continued vitality and availability to maritime claimants.

II. THE LOWER COURT'S DECISION IMPAIRS THE UNIFORMITY OF FEDERAL MARITIME LAW

WBC mischaracterizes Centauri's position by suggesting that Centauri is urging "the uniform rejection of the foreign corporation registration statutes of all fifty states." (Opp. 7). This is clearly not the case.

The problem raised by the decision below is not caused by the registration statutes themselves, but rather by the interplay of corporate registration statutes such as New York's with the extension of personal jurisdiction over foreign corporations through such registration statutes. (Pet. 20-21).

While such an extension of personal jurisdiction may be permissible ordinarily (*see* Pet. 16 n.4), different principles must apply in the context of maritime attachments. This is evidenced by the fact that this Court's ruling in *Shaffer v. Heitner*, 433 U.S. 186 (1977), that *quasi in rem* jurisdiction must satisfy the same due process requirements set with respect to in personam jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny, has almost universally been held not to apply to maritime attachment actions.

For example, in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979), the Second Circuit discussed the applicability of *Shaffer* to maritime attachments, noting that even if it were to apply, "that application must be understood in the light of the special history and circumstances of that unique body of law" since:

> ... the perpetrators of maritime injury are likely to be peripatetic, and since the constitutional power of the federal courts is separately derived in admiralty, U.S. Constitution Art. III § 2, suits under admiralty jurisdiction

> involve separate policies to some extent. This tradition suggests not only that jurisdiction by attachment of property should be accorded special deference in the admiralty context, but also that maritime actors must reasonably expect to be sued where their property may be found.

Amoco, 605 F.2d 655 and n.7 (internal citation omitted). *See also*, *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 732 F.2d 1543 (11th Cir. 1984); *Trans-Asiatic Oil, Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Submersible Sys. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 419 n.2 (5th Cir. 2001); George Rutherglen, *ARTICLE: The Federal Rules for Admiralty and Maritime Cases: A Verdict of Quiescent Years*, 27 J. MAR. L. & COM. 581, 603-04 (October 1996) (noting that "Rule B, in particular, survives in formal defiance of *Shaffer v. Heitner*" since "[i]t does precisely what *Shaffer* forbids, precisely for the reasons that *Shaffer* forbids it ... [allowing] attachment of the vessel for the purpose of forcing the defendant to come into the jurisdiction and submit to personal jurisdiction and [doing] so by relying on the traditional fictions that the court's power extends to the person of the defendant to the extent of his property within its reach.")

Moreover, this situation is analogous to the dilemma faced by the Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), where it rejected the long settled view that a state could satisfy the "substantial nexus" requirement of the Commerce Clause to collect a tax from an out-of-state corporation based on the minimum contacts test used to establish jurisdiction under the Due Process Clause. The Court explained that the "substantial nexus" requirement is not, like due process' "minimum contacts" requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. *Quill*, 504 U.S. at 313. Thus, the Commerce Clause requires a more stringent showing of "physical presence" to establish a nexus between the state and the foreign corporation. *Id.*

Similarly, for a defendant to be "present" within the meaning of Rule B, a more stringent showing of actual presence is required rather than the mere minimum contacts required in a personal jurisdiction analysis. Therefore, as in *Quill*, state law must be rejected to the extent that it seeks to supplant the more stringent requirements.

Thus, contrary to WBC's argument, Centauri has sufficiently demonstrated a basis for pre-emption of state law. Pre-emption obtains not only because of the separate constitutional source of admiralty jurisdiction, but also because the assertion of personal jurisdiction over a defendant through application of New York's corporate registration statute prevents the attachment of a defendant's

property within a district despite the defendant's lack of an actual presence in the district. (Pet. 33). State law must yield where, as here, it works a substantive and material prejudice to the vitality of Rule B attachments and the substantive rights of maritime claimants.

II. THE LOWER COURT'S *JALDHI* DECISION ELEVATES THE IMPORTANCE OF CENTAURI'S PETITION

An examination of the *Jaldhi* decision and the context in which it was issued elevates the importance of Centauri's petition.

In 2002, the Second Circuit issued its decision in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927 (2003), establishing for the first time that electronic funds transfers in the hands of intermediary banks could be property subject to maritime attachment.

The principal issue faced by the Second Circuit in *Winter Storm* was whether New York state law or federal maritime law should govern the issue of whether a defendant had an attachable property interest in a particular *res*. Focusing on the historical importance of maritime attachment and the need for uniformity in its application, the Second Circuit held that state law (and in particular N.Y. U.C.C. § 4A-503) was pre-empted by federal maritime law. *Winter Storm*, 310 F.3d at 279. In 2003, this Court declined to review the *Winter Storm* decision.

However, in 2006, in a footnote to *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006), the Second Circuit invited challenges to its holding in *Winter Storm*, commenting that "the correctness of our decision in *Winter Storm* seems open to question." *Aqua Stoli*, 460 F.3d at 446 n.6.

Until the recent *Jaldhi* decision those challenges were roundly rejected. In September of 2008, the Second Circuit issued its decision in *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008), reaffirming *Winter Storm* as having been "correctly decided" and trumpeting that its holding "ought to jettison any speculation that this note in *Aqua Stoli* foretold the demise of *Winter Storm*." *Consub Delaware*, 543 F.3d at 109. Moreover, the Second Circuit explained that if any change in the practice was counseled, the recourse lay in the hands of Congress since "admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the *Winter Storm* rule." *Id.*

By March of 2009, however, a shift began to take place as evidenced by the Second Circuit's decision in *STX Panocean Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127 (2d Cir. 2009), upon which the decision below solely relied. In *STX Panocean*, the Second Circuit held that New York state law rather than federal maritime law should govern the issue of whether a defendant was "present" in a District for the purposes of Rule B. *STX Panocean*, 560 F.3d at

131.

This trend of permitting state law to supplant federal maritime law in the context of maritime attachments continued with the issuance on October 16, 2009, of the *Jaldhi* decision, where without holding an *en banc* hearing, as is customary, a panel of the Second Circuit announced the reversal of *Winter Storm* and *Consub Delaware*, characterizing those decisions as having been wrongly decided. This unexpected development was the result of a *sua sponte* review of these prior holdings, since none of the litigants in *Jaldhi* had raised the issue of whether *Winter Storm* or *Consub Delaware* were correctly decided.

In an unusual preface to its analysis, the *Jaldhi* panel attempted to provide a justification for its sudden reversal from recent precedent, noting that "[v]arious commentators and courts have suggested that *Winter Storm* directly led to strains on federal courts and international banks operating within our Circuit ... [a]nd some have even suggested that *Winter Storm* has threatened the usefulness of the dollar in international transactions." *Jaldhi*, 2009 U.S. App. LEXIS 22747, at *7 (internal citations omitted).

Thus, the *Jaldhi* panel admitted that its decision was motivated out of concern that "[u]ndermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's

standing as an international financial center" and was further part of a larger "trend toward limiting maritime attachments of EFTs in our Circuit" as exemplified by *STX Panocean*. *Jaldhi*, 2009 U.S. App. LEXIS 22747, at **10 and 15.

Therefore, the Second Circuit's recent ruling in *Jaldhi* is not an obstacle to review: it is a further reason to grant review. The *Jaldhi* decision is highly unusual and troubling, not only because of its further evisceration of the traditional remedy of maritime attachment, but also because of its intrusion on Congressional authority and candid admission that the outcome was motivated by policy considerations and legislative ambitions.

Post-*Jaldhi*, it is clear that there is an emerging trend in the Second Circuit of denying maritime claimants access to Rule B through the impermissible application of state law over federal maritime law. Absent review by this Court, this trend will remain unchecked to the detriment of maritime claimants world-wide.

CONCLUSION

For all of the foregoing reasons and for those set forth before, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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